IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

TANYA MARSE, Appellant, v. QUALITY FOOD CENTERS, INC., Respondent.	No. 33863-7-II UNPUBLISHED OPINION

Hunt, J. — Tanya Marse appeals the summary judgment dismissal of her employment discrimination claims against Quality Food Centers (QFC) based on allegations of outrage, failure to accommodate, hostile work environment, failure to promote, harassment, and unequal treatment because she is developmentally disabled. Marse argues that the trial court erred in granting summary judgment because there was a genuine issue of material fact about whether her mother placed QFC on notice of her disability sufficient to require QFC to accommodate her disabilities. We disagree and affirm.

FACTS

I. Employment

Tanya Marse, who is developmentally disabled, began working in a union position as a courtesy clerk at Quality Food Centers (QFC) grocery store after she graduated from high school in 1996. Her job duties included bagging groceries, taking grocery bags to customers' cars,

collecting shopping carts, and cleaning bathrooms. Marse worked for QFC for six years, during which time QFC never formally disciplined, suspended, or promoted her, despite her applying for several promotions.

According to Marse, QFC employees and management harassed and humiliated her. She asserted that in 1998, a QFC employee, Maggie Nicolette, (1) repeatedly refused to allow Marse to use the restroom as frequently as she needed; (2) embarrassed Marse by asking, within earshot of customers, if she were pregnant or menstruating; (3) often asked Marse if she was washing her uniform; and (4) complained that Marse was dirty and smelled bad.

Other QFC employees also complained about Marse's hygiene and cleanliness, which embarrassed her. In one instance, Marse had accepted coffee from a customer, and her managers counseled her in private that it is against company policy to accept gifts from customers. Another time, Marse's manager asked her to wash a temporary henna tattoo off her hand after a customer complained that Marse's hand looked dirty.

II. Failure to Return to Work; Termination

In February 2003, after Marse had cleaned the QFC restroom as part of her normal job duties, a QFC manager asked her to clean the bathroom again because a customer had complained that it smelled bad. Marse believed that the bathroom was clean and that the intent of the manager's request was to harass her. Marse walked off the job and did not return.

QFC informed Marse by letter that she must either return to work or apply for a leave of absence or that QFC would terminate her employment. Marse submitted a request for medical leave for stress and anxiety caused by the QFC work environment. QFC granted her six months

medical leave, applying it retroactively.

When Marse's six-month medical leave expired, Marse chose not to return to work. QFC then formally terminated her employment.

III. Procedure

Marse sued QFC, alleging six causes of action: (1) outrage, (2) failure to accommodate a disability, (3) hostile work environment, (4) wrongful constructive discharge, (5) negligent infliction of emotional distress, and (6) violation of the Washington Consumer Protection Act. She later amended her complaint, adding additional claims for QFC's failure to promote her because of her disability.

QFC moved for partial summary judgment on the six claims in Marse's original complaint. Marse opposed the motion and filed a response and several declarations, including two declarations by Marse's mother and one by Marse's family doctor. The trial court (1) ruled that Marse had "failed to submit sworn statements with admissible evidence that raised a genuine dispute regarding material issues of fact in response to defendant's motion," Clerk's Papers (CP) Vol. II at 237; (2) granted QFC's summary judgment motion, dismissing all six of Marse's original causes of action; and (3) left intact only Marse's failure to promote claims.

Marse moved for reconsideration, arguing that the trial court had incorrectly interpreted the law of disability discrimination and that she submitted substantial evidence to support her claims. Marse also submitted a new declaration from her mother, Ginger Marse, asserting for the first time that she (Ginger Marse) had told a QFC employee about her daughter's disability. The trial court denied Marse's motion for reconsideration.

QFC also moved for summary judgment on Marse's remaining claims for failure to promote, arguing that (1) the statute of limitations barred three of the claims, and (2) Marse had failed to raise a genuine issue of material fact on the remaining claims. The trial court dismissed Marse's failure to promote claims for her employment period before July 8, 2001, because they were time-barred. But the court also denied QFC's motion for summary judgment on Marse's remaining failure to promote claims. Following a bench trial on those remaining claims, the trial court found in QFC's favor.

Marse appeals the trial court's dismissal of her claims on summary judgment.[1]

ANALYSIS

I. Summary Judgment

Asserting there were genuine issues of material fact, Marse first argues that the trial court erred in entering summary judgment and dismissing her claims of outrage, failure to accommodate a disability, and hostile work environment.[2] We disagree.

A. Standard of Review

When reviewing an order granting summary judgment, we engage in the same inquiry as the trial court. *Kahn v. Salerno*, 90 Wn. App. 110, 117, 951 P.2d 321 (1998). Summary

[1] Marse does not appeal the adverse judgment following a bench trial on her remaining failure to promote claims.

[2] Although Marse generally assigns error to the trial court's granting QFC's summary judgment motion, she did not brief the issues underlying summary dismissal of her claims for (1) negligent infliction of emotional distress, (2) constructive discharge, and (3) violation of the Consumer Protection Act. Therefore, we do not address them. *See* RAP 10.3(a)(5); *Bostain v. Food Express, Inc.*, 127 Wn. App. 499, 501 n.1, 111 P.3d 906 (2005), *review denied*, 156 Wn.2d 1010 (2006).

judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." CR 56(c); *Wilson v. Steinbach*, 98 Wn.2d 434, 437, 656 P.2d 1030 (1982). A material fact is one on which the outcome of the litigation depends, in whole or in part. *Morris v. McNicol*, 83 Wn.2d 491, 494, 519 P.2d 7 (1974).

The court must consider the facts submitted and all reasonable inferences from those facts in the light most favorable to the nonmoving party, here, Marse. *Clements v. Travelers Indem. Co.*, 121 Wn.2d 243, 249, 850 P.2d 1298 (1993). But the nonmoving party must set forth specific facts to defeat a motion for summary judgment. *Young v. Key Pharms., Inc.*, 112 Wn.2d 216, 225-26, 770 P.2d 182 (1989). A plaintiff in a discrimination case must establish specific and material facts to support each element of her prima facie case. *Marquis v. City of Spokane*, 130 Wn.2d 97, 105, 922 P.2d 43 (1996). She cannot rely on bare allegations. *Young*, *supra.*

B. No Outrage

The tort of outrage requires proof of three elements: (1) extreme and outrageous conduct, (2) intentional or reckless infliction of emotional distress, and (3) severe emotional distress to the plaintiff as the actual result. *Kloepfel v. Bokor*, 149 Wn.2d 192, 195, 66 P.3d 630 (2003). Although these three elements are factual questions for the jury, the trial court must first determine whether reasonable minds could differ on whether the conduct was sufficiently extreme to result in liability. *Robel v. Roundup Corp.*, 148 Wn.2d 35, 51, 59 P.3d 611 (2002).

Any claim of outrage must be predicated on behavior "*so outrageous in character, and so*

extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community." *Kloepfel*, 149 Wn.2d at 196 (quoting *Grimsby v. Samson*, 85 Wn.2d 52, 59, 530 P.2d 291 (1975)). Consequently, "mere insults and indignities, such as causing embarrassment or humiliation, will not support imposition of liability on a claim of outrage." *Dicomes v. State*, 113 Wn.2d 612, 630, 782 P.2d 1002 (1989).

Marse argues only that our Supreme Court in *Robel* held that a plaintiff's claim of employment-related outrage was properly a jury question. *Robel*, however, is distinguishable because the claimed outrageous conduct there was more severe than that Marse alleges. In *Robel*, the managers and co-workers repeatedly called her "bitch" and "cunt" in front of customers, to such an extent that Robel acquired the nickname "cunt." *Robel*, 148 Wn.2d at 53-54. Robel's managers and co-workers also repeatedly attacked her because she had filed a Labor & Industries claim for a workplace injury. *Robel*, 148 Wn.2d at 40, 54.

Marse's allegations of QFC complaints about such things as her hygiene, in contrast, are not so extremely indecent. *Kloepfel*, 149 W.2d at 196. Marse based her outrage claim on allegations that QFC management criticized her about (1) the cleanliness of her uniform, (2) her hygiene, (3) her accepting coffee from a customer, (4) her frequent restroom breaks during her then-unknown pregnancy, and (5) her cleaning of the bathroom. Taking these facts in the light most favorable to Marse, as we must on summary judgment, they were not extreme and outrageous because every comment related directly to Marse's compliance with her job duties (1) to wear a clean uniform, (2) to maintain good hygiene, (3) to refrain from accepting gifts from customers, (4) to take breaks during scheduled times or to request an accommodation, and (5) to

clean the bathroom in a fashion satisfactory to customers. CP Vol. V at 800-12. Thus, *Robel* does not control.

Moreover, Marse bases her outrage claim almost wholly on her allegation that the criticism "reduced her to tears and humiliated her occasion after occasion." Br. Of Appellant at 20. Our Supreme Court, however, has held acts that merely cause embarrassment and humiliation are not actionable as tortious outrage. *Dicomes*, 113 Wn.2d at 630.

We agree with the trial court that, as a matter of law, there was no genuine issue of material fact supporting Marse's outrage claim. Accordingly, we hold that the trial court properly granted summary judgment on Marse's outrage claim.

C. No Disability Discrimination

Marse also argues that the trial court erred in granting summary judgment to QFC on her disability discrimination claims for failure to accommodate and hostile work environment. Appellant's Op. Br. at 1-3. Again, we disagree.

Marse filed her disability discrimination claims under the Washington Law Against Discrimination (WLAD), chapter 49.60 RCW. WLAD prohibits an employer from discriminating against an employee based on his or her sensory, mental, or physical disability in the terms or conditions of employment. RCW 49.60.180(3). An employer's failure reasonably to accommodate the sensory, mental, or physical limitations of a disabled employee constitutes illegal discrimination under the WLAD unless the employer can demonstrate that such accommodation would result in undue hardship to the employer's business. *Pulcino v. Fed. Express Corp.*, 141 Wn.2d 629, 639-40, 9 P.3d 787 (2000).

1. No notice and no failure to accommodate

To establish a prima facie case of failure to accommodate, an employee must prove that (1) she had a sensory, mental, or physical abnormality that substantially limited her ability to perform her job; (2) she was qualified to perform the essential functions of the job; (3) she gave her employer notice of the abnormality and its accompanying substantial limitations; and (4) in spite of such notice, the employer failed affirmatively to adopt available measures that were medically necessary to accommodate the abnormality. *Hill v. BCTI Income Fund-I*, 144 Wn.2d 172, 192-93, 23 P.3d 440 (2001).

QFC argues that Marse failed to present evidence that (1) she had a disability that substantially limited her ability to perform her job, (2) she provided QFC notice of her disability, and (3) QFC failed to accommodate her disability. Regardless of whether Marse may have presented sufficient evidence of her disability for purposes of summary judgment,[3] we agree with QFC and the trial court that Marse did not submit legally sufficient evidence to create a genuine issue of material fact with respect to notice of her disability to QFC and QFC's failure to accommodate.

Viewing the evidence in the light most favorable to Marse, the evidence is insufficient to establish notice of Marse's disability to QFC. First, Marse's mother, Ginger Marse, testified that (1) Marse's former employer, Skipper's, had obtained tax benefits for hiring Marse because she is

[3] Marse submitted a declaration by Dr. Lila Day, who testified that Marse is developmentally disabled because Marse is "mentally slow" or a "slow learner." Taking this evidence in the light most favorable to Marse, she presented a genuine issue of material fact that she was disabled and that her disability substantially limited her ability to perform her job duties of receiving workplace criticism, responding to workplace criticism, and interacting with her co-workers and customers.

developmentally disabled; and (2) she (Ginger Marse) "strongly suspect[ed] that QFC did also." CP Vol. II at 198-99. Second, Marse submitted a "Targeted Jobs Tax Credit Pre-Screening Questionnaire" (ostensibly part of her QFC job application), on which Marse had checked the box next to "Division for Vocational Rehabilitation" after the question, "Have you *ever* received services from any of the following programs?"[4] CP Vol. I at 117 (emphasis added).

Ginger Marse's suspicion is not evidence of notice to QFC; rather, it is a "bare allegation," which does not defeat summary judgment on the notice issue. *See Young*, 112 Wn.2d at 225-26. Similarly, QFC's knowledge, by virtue of Marse's answer on her questionnaire that Marse had received services from the Division for Vocational Rehabilitation at some unspecified point in her life, was not notice to QFC that Marse was in any way disabled while employed at QFC.[5]

Accordingly, Marse's failure-to-accommodate argument fails.[6]

2. No hostile work environment

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[4] Ginger Marse's April 1, 2005 declaration, asserting that she told QFC about her daughter's disability, was not before the trial court when it granted summary judgment on March 25, 2005. Therefore, we do not review this declaration on appeal. CR 56(c); *Wilson*, 98 Wn.2d at 437.

[5] Because QFC had no notice or knowledge of Marse's having a disability that needed accommodation, we need not address QFC's alleged failure to accommodate.

But even if Marse had properly provided notice, the evidence is still insufficient to establish QFC's failure to accommodate her disability. Marse asked QFC for only one accommodation relevant to her claims—a leave of absence for stress and anxiety. QFC not only granted her request but also provided six months of medical leave, applying it retroactively to begin the day Marse left work and did not return. Because Marse failed to ask QFC for any other accommodation for her developmental disability, QFC cannot be responsible for any failure to provide accommodation.

[6] Marse also alleged that a QFC manager would not accommodate her frequent need to go to the bathroom due to her pregnancy. But pregnancy is not a disability under the WLAD, *Hegwine v. Longview Fibre Co., Inc.*, 132 Wn. App. 546, 132 P.3d 789 (2006), and Marse did not bring a claim for sex discrimination.

To present a prima facie case of a disability-based hostile work environment, a plaintiff must prove that she was disabled and harassed and that this harassment (1) was unwelcome, (2)

was because of her disability, (3) affected the terms or conditions of her employment, and (4) was imputable to her employer. *Robel*, 148 Wn.2d at 45. Marse similarly failed to present a genuine issue of material fact as to this claim.

Marse presented no evidence that any QFC employee knew she was disabled, and therefore, she failed to establish that any harassment she received at QFC was because of her disability. Accordingly, Marse's claim of hostile work environment also fails.

We hold that the trial court properly granted summary judgment to QFC on Marse's claims of outrage, failure to accommodate a disability, and hostile work environment.

II. Motion To Reconsider

Marse next argues the trial court erred in denying her motion to reconsider its March 2005 grant of summary judgment to QFC. Appellant's Op. Br. at 1. QFC counters that the trial court properly denied Marse's motion because she did not provide the trial court with newly discovered evidence. We agree with QFC.

A. Standard of Review

A trial court has discretion to grant or deny a motion for reconsideration. We will not reverse such decision unless the trial court clearly abused its discretion. *State v. Scott*, 92 Wn.2d 209, 212, 595 P.2d 549 (1979). A trial court abuses discretion when its decision is based on untenable grounds or reasons. *Wilcox v. Lexington Eye Institute*, 130 Wn. App. 234, 241, 122 P.3d 729 (2005). Such is not the case here.

Under (CR) 59(a), an aggrieved party may move a trial court to reconsider its grant of summary judgment. The trial court may then vacate the order if, due to a cause listed in the rule,

the order materially affected the aggrieved party's substantial right. CR 59(a). CR 59(a) lists nine such causes, two of which are relevant here:[7]

> (4) Newly discovered evidence, material for the party making the application, which he could not with reasonable diligence have discovered and produced at the trial; [or]
> . . . .
> (7) That there is no evidence or reasonable inference from the evidence to justify the verdict or the decision, or that it is contrary to law . . . .

CR 59(a). We examine each cause in turn.

B. No Newly Discovered Evidence

QFC argues primarily that Marse did not present newly discovered evidence when she filed her motion to reconsider. We agree.

"Newly discovered evidence" is not simply any new evidence the moving party happens upon. Rather, CR 59(a) requires the party to show that she "could not with reasonable diligence have discovered and produced [this evidence] at the trial." In other words, the party moving for reconsideration must make an adequate showing of why she did not previously offer the evidence. *Morinaga v. Vue*, 85 Wn. App. 822, 831, 935 P.2d 637, *review denied*, 133 Wn.2d 1012 (1997). Marse failed to make such a showing here.

Marse accompanied her motion to reconsider with declarations from her mother, Ginger Marse, which she had not offered to the trial court previously when QFC moved for summary judgment. The record shows Marse submitted this key declaration from Ginger Marse only when she (Marse) moved for reconsideration, even though Marse had submitted other declarations by

[7] The record before us does not indicate on what grounds the trial court denied Marse's motion to reconsider. Therefore, we review the two sections of CR 59(a) that, in our view, are relevant.

Ginger Marse before the trial court granted QFC's motion for summary judgment. Marse never explained to the trial court why she had failed to offer this other, allegedly newly-discovered, declaration before moving for reconsideration.[8]

We hold, therefore, that the trial court did not abuse its discretion by denying Marse's motion under CR 59(a)(4).

C. Sufficient Evidence And No Error In Law

In her motion for reconsideration, Marse argued generally, for the first time, that the trial court had wrongly granted summary judgment to QFC based on insufficiency of evidence and the legal standards for disability discrimination claims. But CR 59(a)(7) does not permit a plaintiff to propose new theories of the case that she could have raised before the trial court entered the adverse decision. *Wilcox*, 130 Wn. App. at 241.

We hold that the trial court did not abuse its discretion when it denied Marse's motion to reconsider.

III. Failure-To-Promote Claims—Time-Barred

Lastly, Marse argues the trial court erred in granting partial summary judgment in favor of QFC with respect to her failure-to-promote claims occurring before July 8, 2001. This argument also fails.

A. Statute of Limitations

WLAD, chapter 49.60 RCW, does not contain its own limitations period. Therefore, generally a plaintiff is subject to the catch-all personal-injury statute of limitations under RCW

[8] Nor does she suggest an explanation on appeal.

4.16.080(2), requiring a plaintiff to bring a discrimination claim within three years of the alleged violation. *Antonius v. King County*, 153 Wn.2d 256, 261-62, 103 P.3d 729 (2004). Courts may, nevertheless, toll the statute of limitations based on an equitable exception. *Douchette v. Bethel School Dist. No. 403*, 117 Wn.2d 805, 810-13, 818 P.2d 1362 (1991).

One such exception is the "systemic continuing violation" doctrine, which allows a plaintiff to allege otherwise time-barred discriminatory acts if the discrimination claim is based on the cumulative effect of individual acts.[9] *Antonius*, 153 Wn.2d at 262. For example, a claim of hostile work environment requires proof of repeated conduct; thus, this type of claim does not necessarily accrue on a readily discernible date. *Antonius*, 153 Wn.2d at 262. For such systemic claims, courts calculate the statute of limitations by looking at the employer's behavior as a whole; if part of the alleged violation occurred within the three-year period, then the plaintiff's claim is timely. *See Antonius*, 153 Wn.2d at 263-64.

On the other hand, other types of discrimination manifest in discrete acts, such as termination or refusal to hire. *See Antonius*, 153 Wn.2d at 264. The three-year statute of limitations applies to claims based on such discrete violations. *Antonius*, 153 Wn.2d at 264, 269.

B. Time-Barred

Marse sued QFC on July 7, 2004. Her failure-to-promote claims included acts that allegedly had occurred before July 7, 2001. Marse argues that the three-year statute of limitations did not bar her claim for QFC's acts because they constituted a systemic violation. We disagree.

[9] The "continuing violation" doctrine also once allowed courts to toll the statute of limitations for "serial" violations. *See Bettena Washington v. Boeing Co.*, 105 Wn. App. 1, 8, 19 P.3d 1041 (2000). But our Supreme Court, in *Antonius*, rejected tolling for serial violations. 156 Wn.2d at 269.

Marse did not originally allege a systemic violation. Instead, she claimed that each instance in which QFC did not promote her constituted an individual violation. Thus, Marse's claim did not describe a situation in which the alleged discrimination was "composed of a series of separate acts that collectively constitute 'one unlawful employment practice.'" *Antonius*, 153 Wn.2d at 264 (quoting *Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 117, 122 S. Ct. 2061, 153 L. Ed. 2d 106 (2002)). Failure-to-promote claims are an example of employment discrimination based on discrete acts, which do not fall within the continuing violation doctrine. *Antonius*, 153 Wn.2d at 264 (citing *Morgan*, 536 U.S. at 117).

We hold, therefore, that the trial court (1) correctly applied the general three-year statute of limitations to Marse's failure-to-promote claims and (2) did not err in dismissing Marse's failure-to-promote claims as untimely.

Affirmed.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

Hunt, J.

We concur:

Armstrong, J.

Van Deren, A.C.J.